

STATEMENT OF THE CASE

Frank D. Pangallo brings this consolidated appeal from his sentences after he was convicted of Attempted Burglary, as a Class C felony, and Theft, as a Class D felony, following unconditional guilty pleas to the trial court in two different cause numbers.¹ Pangallo raises a single issue for our review, which we restate as whether the trial court abused its discretion in sentencing Pangallo.²

We affirm.

FACTS AND PROCEDURAL HISTORY

On April 6, 2005, Pangallo and another man attempted to break into a home in Mishawaka. The two attempted to open the door to the home with a flat piece of metal, but they were unsuccessful. On April 8, the State charged Pangallo with attempted burglary, as a Class B felony, in Cause Number 71D01-0504-FB-27 (“Cause 27”). On January 3, 2007, Pangallo pleaded guilty to attempted burglary, as a Class B felony. The court delayed Pangallo’s sentencing hearing due to his hospitalization at the Richmond State Hospital for addiction-related problems.

On April 18, 2007, Pangallo entered a Dollar General store in Mishawaka with a female companion and stole some items. On April 23, the State charged him with theft, as a Class D felony. Pangallo pleaded guilty to that charge on August 27, 2007, in Cause Number 71D02-0704-FD-439 (“Cause 439”).

¹ In a third action, Pangallo pleaded guilty to theft, as a Class A misdemeanor. Pangallo does not appeal that conviction or the sentence resulting from that conviction.

² Pangallo’s passing reference to an “inappropriate” sentence is insufficient to invoke our review of his sentence under Indiana Appellate Rule 7(B). See Ind. Appellate Rule 46(A)(8)(a); Appellant’s Brief in Cause 439 at 1, 4.

On March 13, 2008, the trial court held a consolidated sentencing hearing. At that hearing, the following exchange took place:

THE COURT: You know you have a horrendous criminal history.

MR. PANGALLO: Oh, man, I know. I'm not proud of it.

THE COURT: I mean I don't know how many felonies we're talking about.

MR. PANGALLO: Seven, eight.

THE COURT: At least.

MR. PANGALLO: Maybe more. I don't know.

* * *

MR. PANGALLO: I've been sick for several years with drugs. . . .

* * *

MR. SKODINSKI (for Pangallo): We'd be ask[ing] that [the two-year minimum sentence for the Class C felony conviction³] be all that you impose and suspend anything over that because of the nature of this case—

THE COURT: Let me tell you all something right now. I am not going to have a suspended sentence for Frank Pangallo. Whatever he's going to do, he's going to serve.

MR. SKODINSKI: All right.

THE COURT: Whatever is not going to be done is not going to be probation. Because I think Frank has enough worries that he has to deal with that he isn't worried about the criminal justice system. If Frank decides to stop all this stuff and never does more stuff, then he has got—God knows he's got enough on his plate to try to straighten himself out.

MR. SKODINSKI: Right.

³ At the time of Pangallo's commission of attempted burglary, Indiana Code Section 35-50-2-6 permitted the trial court to sentence a defendant on a Class C felony conviction to a fixed term between two and eight years, with a presumptive term of four years.

THE COURT: So I do not think Frank would succeed on probation.

* * *

MR. SKODINSKI: Okay. Then it doesn't make any sense to argue for the minimum because of his prior record. However, I think that his prior record is somewhat offset by the nature of this case, the fact that the other man asked him to help—

* * *

MR. SKODINSKI: Well, I guess I'd still argue you only give him two years. It's tough with all the prior felonies but that you not give him any more than the [presumptive] at least.

* * *

MR. PANGALLO: I'd ask you to be as lenient as possible, please. I'm worried. I'm just worried about, you know, the rest of the . . . family I've got, my mom. I lost my dad when I was in prison. . . .

* * *

MR. PANGALLO: I'm starting to realize my sickness by this book right here I'm reading. I'm learning a lot from this right here.

THE COURT: You have an addictive problem, a poly addiction it's called.

MR. PANGALLO: Even not using is a problem. I [have] got to learn how to live again.

THE COURT: That's correct.

* * *

MR. PANGALLO: . . . I was about to get committed by the—I got into it with the doctor. He wanted to commit me. They put me on suicide watch there. He wanted to commit me. . . .

* * *

MR. PANGALLO: He wanted to commit me, but I didn't want to be committed. I should have let him commit me probably. But he did say the judge can commit you. He did say that.

THE COURT: With all due respect to the doctor, I cannot commit you to a mental hospital. I cannot.

* * *

THE COURT: But anyway you don't want to go there anyway.

MR. PANGALLO: Not now.

* * *

THE COURT: He doesn't want to go there. He didn't want to stay there. And he isn't going to thrive if he's where he's not supposed to be and where they're doing drugs.

* * *

THE COURT: Well, then let's get on with it. We're talking about an executed sentence and the question is how much. It's two to eight. Your record is such that it could easily be eight.

* * *

THE COURT: ... And you're saying no more than [four years], and you would like it to be the minimum. But you know there's a terrible record here. Terrible. Plus since you did this one, you've done others. That also is bothersome.

* * *

THE COURT: What do you think is fair? . . .

MR. PANGALLO: The whole sentence.

THE COURT: Well, I'm not going to do that. I'm going to give you the [presumptive] which is what your attorney asked for and that's a gift.

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THE COURT: All right. That's that one. Now we have the next one which really has [its] problems for me and for you.

* * *

THE COURT: Why did you [commit the Class D felony theft]?

MR. PANGALLO: I had no idea what was going on at the time I don't know if that woman stuck it in my coat or what

* * *

MR. PANGALLO: I was screwed up out of my mind that day.

THE COURT: I understand that.

* * *

THE COURT: . . . I'll tell you what's wrong with this whole situation. You were screwed up back in '03, '04, '05. But for you to be doing this in '07 with all of this other stuff pending is really an aggravator.

MR. PANGALLO: I was whacked out there.

THE COURT: I know but you were out there and you were doing it.

* * *

THE COURT: It's wrong. And I think there's a time when you've got to pay something.

* * *

THE COURT: Okay. All right. Well, it comes down to this. We really have a problem here in that the last case while we were trying for years literally to work out something appropriate to deal with Frank Pangallo's challenges as to his ways of thinking and acting with this going on, in the one case Frank Pangallo had been in the court for the first time in July of '04. And pages of court appearances since then before this incident. And in the other case he had been in court in April of '05 on that case and had multiple court appearances trying to deal with that case.

And while that is all going on in April of '07 . . . Frank Pangallo admittedly ridiculously did this thing in the store. And it's theft. It's just crazy.

I have to say that at some point there has to be enough is enough. This is it. I will remind the defendant that that same argument might have been made for the Attempted Burglary But for this case to have occurred when these other two cases were trying to be worked out is really—there has to be a time to pay the price and the time I think in this case is here. . . .

I think the three years [maximum for a Class D felony⁴] here because Mr. Pangallo did it while all this other was [sic] still pending so many times in court is something that he should have to serve the punishment for, and that's what I'm going to do.

Transcript at 23, 36-43, 47, 50-53, 56-58.

Hence, the trial court sentenced Pangallo to the presumptive sentence of four years on the Class C felony conviction and the maximum sentence of three years on the Class D felony conviction.⁵ The court also ordered the Department of Correction to “consider placing the Defendant at the New Castle facility due to his mental and substance abuse issues.” Appellant’s App. at 9. This appeal ensued.

DISCUSSION AND DECISION

Cause 27

We first note that Pangallo’s sentence in Cause 27 was imposed under our presumptive sentencing scheme. Pangallo committed his attempted burglary on April 5, 2005, twenty days before the advisory sentencing scheme became effective. See P.L. 71-2005 §§ 9, 16; Gutermuth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007). Our standard of

⁴ Indiana Code Section 35-50-2-7 permits the trial court to sentence a defendant convicted of a Class D felony to a fixed term between six months and three years, with the advisory term being one and one-half years.

⁵ It is not clear from the appellate record whether the sentences were ordered to be served concurrently or consecutively.

review under the presumptive sentencing scheme is such that we will not reverse the trial court's sentencing determination absent a showing of manifest abuse of the court's discretion. See, e.g., Bacher v. State, 722 N.E.2d 799, 801 (Ind. 2000).

Here, Pangallo's entire argument is as follows:

Reference was made at sentencing to Defendant's prior treatment and need for additional treatment at a mental health facility, his poly-addiction, and his dysfunctional family.

The Defendant pointed out that he has been sick for several years with drugs. Mrs. Pangallo also stated that he needed hospital treatment. The Defendant referred to his "sickness" with drugs and that he needs to learn how to live again.

Although there was a discussion between the parties, there was no clear identification by the Court of the Defendant's many problems which contributed to the commission of this offense. The Court is obliged to identify all significant aggravating and mitigating factors. The Appellate Court may review for a failure to do so.

Appellant's Brief in Cause 27 at 3-4 (citations omitted).

As detailed in the Facts and Procedural History, supra, Pangallo's argument that the trial court abused its discretion in sentencing him in Cause 27 is not supported by the record. The trial court thoroughly considered Pangallo's proposed mitigators and, despite his lengthy criminal history, ordered him to serve the presumptive sentence. The court also instructed the Department of Correction to consider placing Pangallo in a medical facility. Pangallo's argument on appeal does not demonstrate that the trial court abused its discretion in sentencing him to four years for attempted burglary, as a Class C felony.

Cause 439

Pangallo's sentence in Cause 439 was imposed pursuant to our advisory sentencing scheme. Under that statutory scheme, sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of that

discretion. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on other grounds on reh’g, 875 N.E.2d 218 (Ind. 2007). “An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.” Id. (quotation omitted).

One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other examples include entering a sentencing statement that explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. Under those circumstances, remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.

Id. at 490-91. Further, “the trial court no longer has any obligation to ‘weigh’ aggravating and mitigating factors against each other when imposing a sentence.” Id. at 491.

On appeal in Cause 439, Pangallo similarly argues that the trial court failed to consider certain mitigating factors. Specifically, Pangallo’s entire argument is as follows:

At Pangallo’s sentencing hearing, reference was made to the following mitigating factors:

1. Pangallo’s previous referral to Richmond State Hospital and Madison Center for mental health treatment;
2. Pangallo’s poly-addiction problems;
3. Pangallo’s dysfunctional behavior and family;

4. Pangallo being “whacked out” at the time of the offense, having no memory of the offense; and
5. The Defendant’s non-violent criminal record.

Although the sentencing hearing was lengthy and rambling, and involved not only the State, Defendant, and counsel, but also Pangallo’s mother and friend, the Court never recognized specifically the mitigating factors.

The Court’s sentencing statement must identify all significant aggravating and mitigating factors, explain why such factors were found, and balance the factors in arriving at a sentence[.] Field v. State, 843 [N.E.2d] 1008 (Ct. App. 2006). Although the Appellate Court cannot review the weight assigned to aggravators and mitigators, Phillips v. State, 869 [N.E.2d] 512 (Ind. App. 2007), it certainly may review the failure to recognize these factors.

Appellant’s Brief in Cause 439 at 3-4.

Again, as detailed above, Pangallo’s argument that the trial court abused its discretion in sentencing him in Cause 439 is not supported by the record. The trial court thoroughly considered Pangallo’s proposed mitigators when it ordered him to serve the maximum three-year sentence for the Class D felony conviction. And insofar as the trial court may have failed to consider one of Pangallo’s proposed mitigators, Pangallo’s argument on appeal in no way convinces us that the trial court would give him a different sentence were we to remand. Rather, we can say with complete confidence that “the trial court would have imposed the same sentence” had it considered the reasons now proffered by Pangallo. See Anglemyer, 868 N.E.2d at 491. As such, the court did not abuse its discretion in sentencing Pangallo under Cause 439. We affirm the trial court’s sentencing decision in each cause number.

Affirmed.

ROBB, J., and MAY, J., concur.